Filed 1/26/10 In re Xavier H. CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| In re XAVIER H., a Person Coming Under the Juvenile Court Law. | B214261<br>(Los Angeles County<br>Super. Ct. No. PJ40021) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>XAVIER H.,<br><br>Defendant and Appellant. | |

APPEAL from a judgment of the Superior Court of Los Angeles County, Jack Gold, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Modified and remanded, otherwise affirmed.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

On October 29, 2008, a petition under Welfare and Institutions Code section 602 was filed alleging that minor and appellant Xavier H. violated Vehicle Code section 10851, subdivision (a), the unlawful driving or taking of a vehicle. On February 2, 2009, the minor admitted the count, and he was committed to a three-month camp program.[1] The juvenile court set the maximum term of confinement at four years, four months. The minor then filed an appeal raising two issues.

First, the minor contends that the minute order must be amended to reflect probation terms verbally imposed at the disposition hearing. At the hearing, the juvenile court ordered all prior terms and conditions of probation to remain in full force and effect. The court also orally ordered, "[w]hile in camp, have no gang activity. Do the program. Stay out of trouble." The minute order states that the "[c]onditions of probation made 9/4/07 remain in full force and effect and are modified to include #'s 7 (Camp) and 15 (Known Gang Members)."

Minor states that there are three problems with these conditions of probation. First, probation condition No. 7 orders the minor not to leave camp without permission. Minor argues that condition should be stricken, because the juvenile court did not order it to be imposed.[2] The argument is correct: the juvenile court neither imposed it nor was it a prior condition of probation. The general rule is a court's oral pronouncements prevail over the minute order. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) Therefore, the condition should be stricken.

---

[1] As part of the plea agreement, a second petition filed under Welfare and Institutions Code section 777 was dismissed.

[2] The Attorney General's sole response is that the minor failed to satisfy his burden of proof on this issue, because the prior conditions of probation imposed based on the September 4, 2007 petition are not in this record. To remedy that omission, appellant's counsel has filed a motion to augment the record on appeal to include documents filed in appeal No. B210752, including the minute order of September 4, 2007. Under Evidence Code section 452, we grant the motion and take judicial notice of the documents filed in that appeal.

Second, the minute order imposes condition of probation No. 15, which states that the minor is not to associate with anyone known by the minor to be disapproved of by his parents or probation officer. The minor contends that condition of probation No. 15, to the extent it prohibits him from associating with known gang members, must be stricken because that condition was not orally imposed. But condition of probation No. 15 was one of the previously imposed conditions of probation. The juvenile court expressly ordered all prior conditions to remain in full force and effect. Moreover, we modified that condition in connection with the minor's appeal in Case No. B202246 (*In re Xavier H.* (Feb. 25, 2008) [nonpub. opn.]) to direct the minor not to associate with anyone whom he knows is disapproved of by his parents and probation officer. It therefore need not be stricken or modified.

Finally, the juvenile court orally said, "[w]hile in camp, have no gang activity." Although the minute order does not refer to condition of probation No. 15a, it appears that the court intended to impose it. That condition prohibits the minor from participating in any type of known gang activity. Minor argues that if it is imposed, it should be modified so that he is precluded from participating in any type of known gang activity "[w]hile in camp." Although the court used that limiting phrase, there is nothing in the record or reason why the court would prohibit the minor from participating in gang activity "[w]hile in camp" but allow such behavior outside of camp. In fact, the court generally told the minor to "[s]tay out of trouble." This admonition, broadly interpreted, prohibits the minor from participating in gang activity—whether in or out of camp. The requested modification is therefore unnecessary.

The minor's second contention on appeal is that the juvenile court failed to comply with Welfare and Institutions Code section 702. It states in part that if "the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a

misdemeanor or felony." Where such a " 'wobbler' " offense is at issue, the provision requires an "explicit declaration by the juvenile court." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.) A violation of Vehicle Code section 10851, subdivision (a), is punishable "by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment." Unlawful taking or driving a vehicle without the owner's consent is a " 'wobbler' " offense, and the court was therefore required to declare the offense a misdemeanor or a felony.

The juvenile court did not, however, comply with Welfare and Institutions Code section 702. Although the court did check the box at line 30 of the minute order to indicate the offense was a felony and imposed a felony-length term, this is insufficient to comply with section 702. (*In re Manzy W., supra,* 14 Cal.4th at pp. 1207-1209.) Where, as here, the record as a whole does not show that the juvenile court knew it had the discretion to treat the offense as either a misdemeanor or a felony, remand is necessary, an outcome with which the Attorney General agrees.

**DISPOSITION**

The motion to augment the record on appeal is granted. The judgment is modified to strike condition of probation No. 7, and the judgment is otherwise affirmed. The matter is remanded so that the juvenile court can comply with Welfare and Institutions Code section 702.

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.